



DEPARTMENT OF STATE

22 CFR Part 126

[Public Notice: 10363]

RIN 1400-AE24

International Traffic in Arms Regulations: Transfers Made By or For a Department or Agency of the U.S. Government

AGENCY: Department of State.

ACTION: Final rule.

SUMMARY: The Department of State is amending the International Traffic in Arms Regulations (ITAR) to revise the licensing exemption for transfers made by or for an agency of the U.S. Government.

DATES: This rule is effective on [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

FOR FURTHER INFORMATION CONTACT: Robert Monjay, Office of Defense Trade Controls Policy, Department of State, telephone (202) 663-2817; e-mail DDTCPublicComments@state.gov. ATTN: ITAR Amendment – By or For.

SUPPLEMENTARY INFORMATION: The Department published a proposed rule on May 22, 2015 (RIN 1400-AC88, 80 FR 29565) (Proposed Rule) and received 17 public comments. The Department published a final

rule on August 17, 2016 (81 FR 54732) covering those elements of the Proposed Rule not related to the exemption for exports and temporary imports made to or on behalf of a department or agency of the U.S. Government in ITAR § 126.4, and addressed the relevant public comments. This final rule addresses only the proposed revision of that exemption, and addresses only the public comments related to that proposal. The changes to § 126.4 relevant to the existing text are described below.

This final rule revises ITAR § 126.4 to clarify when exports, reexports, retransfers, temporary imports, and performance of a defense service (collectively described as “transfers” for the remainder of this rule) may be made by or for an agency of the U.S. Government without a license, including by employees of the U.S. Government in the performance of their official duties. This rule expands the scope of this exemption to allow for permanent exports, reexports, and retransfers, in addition to temporary exports and imports, and to allow transfers by third parties acting for the U.S. Government. In addition, this rule revises the section heading from shipments to transfers to reflect the scope of the exemption.

The authorization to transfer defense articles and defense services by or for the U.S. Government is divided between paragraphs (a) and (b) in the revised § 126.4. Paragraph (a) applies to transfers made by the U.S.

Government and paragraph (b) applies to transfers made for, or on behalf of, the U.S. Government. Paragraphs (c), (d), (e) and (f) set out additional requirements applicable to transfers made under either paragraph (a) or (b).

Paragraph (a) is revised to authorize those transfers made by a department or agency of the U.S. Government (1) for official use by the U.S. Government, (2) for carrying out certain international agreements or arrangements, (3) for carrying out foreign assistance, or sales programs authorized by statute, or (4) for carrying out certain Department of Defense (DOD) “security cooperation programs and activities,” as that term is defined in paragraph (a)(4)(i). Certain agreements or arrangements entered into with international partners authorized by Title 10, Title 22, or a National Defense Authorization Act are included in paragraph (a)(2), and may be for cooperative research, development, testing, evaluation, or production; reciprocal use of test facilities; loan of equipment and material; personnel exchange; cooperative logistics support, acquisition, and cross-servicing; security of supply; or reciprocal defense procurement activities, among others. The exemption continues to authorize the transfer of technical data, although the Department has deleted the term as redundant because the definition of “defense article” in § 120.6 includes technical data.

Paragraph (a)(1) also provides that use by U.S. Government contractors can be within the scope of the official use of the U.S. Government, when the U.S. Government contractor is either operating within a U.S. Government-controlled facility or a U.S. Government employee is empowered and responsible to exercise control over the defense article. Additionally, the Deputy Assistant Secretary of State for Defense Trade Controls may approve the use of this exemption for other activities by U.S. Government contractors if requested by a department or agency of the U.S. Government. Paragraph (a)(1)(ii)(D) is added to clarify that the provision does not authorize the release of technical data to persons or entities of a country identified in § 126.1, even if they are in a contractual relationship with the U.S. Government.

The existing note is deleted, as the special definition of an item considered to be permanently exported is no longer necessary because the exemption is expanded to allow for permanent and temporary transactions. Paragraph (a)(5) is added to explain that authorization of a transfer under § 126.4 is for purposes of the ITAR only, and that it does not constitute any other form of U.S. Government approval that may be required, including but not limited to requirements imposed by statutes, contracts, or agreements, such as a third party transfer requirement under a Memorandum of

Understanding or foreign assistance program. Additionally, authorization to export does not absolve parties of the requirement to comply with any applicable U.S. Government processes, procedures, or practices, including the need for exports of items on the MTCR Annex to receive the case-by-case review called for by the MTCR Guidelines.

Paragraph (a)(6) is added to retain the existing provision that this exemption cannot be used when the U.S. Government is acting as a transmittal agent on behalf of a private individual or firm, even when it does so in satisfaction of security requirements. The Department removed the requirement that the U.S. Government must conduct all aspects of the transaction and the special definition of permanent export. The Department also eliminated language limiting the scope of the rule to temporary imports and temporary exports, and added a new paragraph (f) to clarify that a Directorate of Defense Trade Controls (DDTC) authorization is required for any change in end-use or end-user not authorized by the section.

Paragraph (a)(7) is added to clarify that exports made in compliance with section 38(b)(2) of the Arms Export Control Act (AECA) (22 U.S.C. 2778(b)(2)) are excluded from the licensing requirements of the AECA and do not require export authorization from DDTC. Any defense article or defense service exported in compliance with section 38(b)(2) is excluded

from ITAR control provided it is either: (1) for official use by a department or agency of the United States Government, as implemented in § 126.4(a)(1) and (b), or (2) for carrying out any foreign assistance or sales program authorized by law and subject to the control of the President by other means, as stated in § 126.4(a)(3) and (b). Unless otherwise authorized pursuant to U.S. law or regulation, reexport or retransfer of defense articles and services exported pursuant to section 38(b)(2) but which no longer are subject to independent controls require authorization from the Department of State. Nothing in ITAR § 126.4 relieves exporters from any other obligation imposed by U.S. law or regulation outside of the ITAR, including any applicable United Nations or U.S. embargo or sanction.

Paragraph (a)(4)(ii) is added to clarify that the U.S. Government agency or entity exporting pursuant to the exemption is required to obtain appropriate end-use assurances from the recipient, including verification that the recipient has knowledge of and intent to comply with paragraph (f).

A new paragraph (b) is added to authorize transfers performed by another entity for a department or agency of the U.S. Government. Third parties may only perform a transfer for a department or agency of the U.S. Government under this exemption when that department or agency would have been authorized to perform the transfer itself under paragraph (a).

Transfers by third parties directly to the U.S. Government overseas may be conducted at the request of the U.S. Government. Transfers by third parties to anyone other than the U.S. Government, including directly to any U.S. Government contractors, must be conducted pursuant to written direction from the U.S. Government department or agency, such as through contractual documents, or pursuant to an international agreement or arrangement. For example, transfers by a company to itself may be authorized by written direction from the U.S. Government department or agency requiring the transfer. Under no circumstances shall a transfer to any non-U.S. Government entity be authorized under paragraph (b)(1). Each department or agency will determine for itself who is authorized to issue such written directions.

A new paragraph (c) is added to clarify that the ITAR does not require an authorization for the return to the United States of a defense article exported under this section provided the defense articles have not been subsequently transferred without authorization or by license or other approval pursuant to another provision of the ITAR. The defense article must be returned to the U.S. Government or to the person who exported it pursuant to paragraph (b).

The Department redesignated the existing paragraph (b) as new paragraph (d) and existing paragraph (d) as new paragraph (e). The Department also removed the text of the existing paragraph (c), as permanent exports are now included in the authorizations in paragraphs (a) and (b). The Department revised new paragraph (d) for clarity and to specifically state that this exemption does not authorize exports that would violate a U.S. or United Nations Security Council arms embargo. The Department revised new paragraph (e) (former paragraph (d)) to clarify that exporters no longer need to provide U.S. Customs and Border Protection with a written certification of compliance with this section and to clarify that the ITAR does not impose an Electronic Export Information (EEI) filing requirement on exports via U.S. Government vehicles, aircraft and vessels. To the extent that other U.S. Government statutes and regulations do impose an EEI filing requirement, this provision is not intended to serve as an exemption from that requirement.

The Department added a new paragraph (f) which provides that authorization from DDTC in the form of a license or other approval, including through § 126.4, is required for any change in the end-use or end-user.

The Department also revised § 126.1(a) to add § 126.4(a)(1) and (3) and (b)(1) to the list of exemptions provided for in the ITAR that apply with respect to defense articles or defense services originating in or for export to any proscribed countries, areas, or persons. Exports may not be made under any other provision of this exemption to the countries that are subject to restrictions identified in § 126.1.

Public Comments and Responses

Several commenters noted the removal of the reference to technical data and assumed that this indicated that the exemption would no longer authorize exports of technical data. As noted above, the Department removed the reference to technical data because it was redundant and confusing. Technical data is a form of defense article and is authorized by the language authorizing the export (now export, reexport, retransfer, and temporary import) of defense articles. By including a reference to technical data, the provision implied that other references to defense articles may not include technical data, which is not accurate. This could leave readers with an incorrect understanding of the ITAR. When the Department wishes to refer only to hardware defense articles or otherwise exclude technical data, it does so explicitly. When the Department refers to defense articles, without modification, the reference includes technical data.

Several commenters requested clarification regarding the scope of official use. Several commenters requested that the Department allow use by contractors who are not U.S. persons. One commenter requested that the Department reevaluate the scope of allowed use by contractors under the exemption. One commenter specifically asked the Department to state that any use by a U.S. Government contractor in the course of contract is within the scope of official use by the U.S. Government. As noted above and in response to these comments, the Department has revised the provisions regarding use by a U.S. Government contractor, and provided that use by U.S. Government contractors is within the scope of the exemption when: (1) the contractor is operating within a U.S. Government-owned facility; (2) a U.S. Government employee is responsible for control of the defense articles; or (3) otherwise approved by DDTC. The Department also removed the requirement from the proposed rule that the contractors be U.S. persons in response to comments, but maintained a restriction on using contractors from § 126.1 countries.

Two commenters requested clarification with respect to exports to U.S. Government contractors for the purpose of carrying out any foreign assistance, cooperative project, or sales program authorized by law. The Department declines to provide a general rule on who can be the recipient of

such transfers, but notes that the transfers should be guided by their authorizing language, such as in an international agreement or statute. If you have questions regarding the scope of a specific international agreement or statutory program, please first contact the department or agency responsible for its implementation. If questions still exist as to the applicability of this provision to a transfer, please submit a request for an advisory opinion to DDTC.

One commenter objected to the prohibition on using the exemption to export an item subject to the Export Administration Regulations (EAR) that is on the MTCR Annex, as the exemption may be used to export a defense article that is on the MTCR Annex. The commenter noted that it does not make sense to require a separate individual authorization for items subject to the EAR, which have been determined to be less sensitive. The Department agrees with this comment. Any MTCR Annex item subject to the EAR may be authorized under this exemption when used in or with a defense article and transferred with a defense article, as set forth in § 120.5(b), and where consistent with paragraph (a)(5).

One commenter requested that the Department revise the provision requiring the U.S. Government to perform or direct all aspects of the transaction. The Department has removed this provision, and replaced it

with provisions providing specific guidance that most exports by third parties require written direction from the relevant department or agency, but that exports directly to the U.S. Government may be performed on request.

Several commenters requested that the Department remove the requirement to include a certification on the airway bill. The Department agrees.

Several commenters requested that the Department remove the requirement to provide a certification to the Port Director. The Department agrees.

REGULATORY ANALYSIS AND NOTICES

Administrative Procedure Act

This rulemaking is exempt from section 553 (Rulemaking) and section 554 (Adjudications) of the Administrative Procedure Act (APA) pursuant to 5 U.S.C. 553(a)(1) as a military or foreign affairs function of the United States Government. Although the Department is of the opinion that this rule is exempt from the rulemaking provisions of the APA, the Department published a proposed rule with a 45-day provision for public comment.

Regulatory Flexibility Act

Since the Department of State is of the opinion that this rule is exempt from the provisions of 5 U.S.C. 553, and there is no other statute that requires that the Regulatory Flexibility Act apply, there is no requirement for an analysis under the Regulatory Flexibility Act.

Unfunded Mandates Reform Act of 1995

This rulemaking does not involve a mandate that will result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any year and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

The Department does not believe this rulemaking is a major rule as defined in 5 U.S.C. 804.

Executive Orders 12372 and 13132

This rulemaking will not have substantial direct effects on the States, on the relationship between the national Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 13132, it is determined that this rulemaking does not have sufficient federalism

implications to require consultations or warrant the preparation of a federalism summary impact statement. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities do not apply to this rulemaking.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributed impacts, and equity). These executive orders stress the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a “significant regulatory action,” although not economically significant, under Executive Order 12866. Accordingly, this rule has been reviewed by the Office of Management and Budget (OMB).

Executive Order 12988

The Department of State has reviewed this rulemaking in light of Executive Order 12988 to eliminate ambiguity, minimize litigation, establish clear legal standards, and reduce burden.

Executive Order 13175

The Department of State has determined that this rulemaking will not have tribal implications, will not impose substantial direct compliance costs on Indian tribal governments, and will not preempt tribal law. Accordingly, the provisions of Executive Order 13175 do not apply to this rulemaking.

Paperwork Reduction Act

This rule does not impose any new reporting or record-keeping requirements subject to the Paperwork Reduction Act, 44 U.S.C. Chapter 35.

List of Subjects in 22 CFR Part 126

Arms and munitions, Exports.

Accordingly, for the reasons set forth above, title 22, chapter I, subchapter M, part 126, of the Code of Federal Regulations is amended as follows:

PART 126—GENERAL POLICIES AND PROVISIONS

1. The authority citation for part 126 continues to read as follows:

Authority: Secs. 2, 38, 40, 42, and 71, Pub. L. 90-629, 90 Stat. 744 (22 U.S.C. 2752, 2778, 2780, 2791, and 2797); 22 U.S.C. 2651a; 22 U.S.C. 287c; E.O. 12918, 59 FR 28205; 3 CFR, 1994 Comp., p. 899; Sec. 1225, Pub. L. 108-375; Sec. 7089, Pub. L. 111-117; Pub. L. 111-266; Section 7045, Pub. L. 112-74; Section 7046, Pub. L. 112-74; E.O. 13637, 78 FR 16129.

2. Section 126.1 is amended by revising paragraph (a) to read as follows:

§126.1 Prohibited exports, imports, and sales to or from certain countries.

(a) *General.* It is the policy of the United States to deny licenses and other approvals for exports and imports of defense articles and defense services, destined for or originating in certain countries. The exemptions provided in this subchapter, except §123.17 of this subchapter and §§126.4(a)(1) or (3) and (b)(1) and 126.6, or when the recipient is a U.S. Government department or agency, do not apply with respect to defense articles or defense services originating in or for export to any proscribed countries, areas, or persons. (See §129.7 of this subchapter, which imposes restrictions on brokering activities similar to those in this section).

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3. Section 126.4 is revised to read as follows:

§126.4 Transfers by or for the United States Government.

(a) *By a department or agency.* A license is not required for the export, reexport, retransfer, or temporary import of a defense article or the performance of a defense service, when made by a department or agency of the U.S. Government:

(1) For official use by a department or agency of the U.S. Government, including:

(i) By employees of the U.S. Government acting within their official capacity; or

(ii) By persons or entities in a contractual relationship with the U.S.

Government using the defense article or performing the defense service to conduct the contracted-for activities within the scope of the contractual relationship and:

(A) Within a U.S. Government-controlled facility;

(B) When an employee of the U.S. Government is empowered and responsible to ensure that the defense article is not diverted and is only used within the scope of the contractual relationship; or

(C) Use of the exemption in paragraph (a)(1)(ii) is authorized by the Deputy Assistant Secretary of State for Defense Trade Controls at the request of a department or agency of the U.S. Government.

(D) The provision in this paragraph (a)(1)(ii) may not be used to release technical data to a person or entity of a country identified in § 126.1.

(2) For carrying out a cooperative project, program, or other activity in furtherance of an agreement or arrangement that provides for the export, reexport, retransfer, or temporary import of the defense article, or the

performance of activities that constitute the defense service, and is one of the following:

(i) A binding international agreement to which the United States or any agency thereof is a party; or

(ii) An arrangement with international partners authorized by Title 10 or 22 of the United States Code or pertinent National Defense Authorization Act provisions.

(3) For carrying out any foreign assistance or sales program authorized by law and subject to control by the President by other means.

(4) For any other security cooperation programs and activities of the Department of Defense authorized by law and subject to control by the President by other means.

(i) For purposes of this paragraph (a)(4), "security cooperation programs and activities of the Department of Defense" means any program, activity, or interaction of the Department of Defense with the security establishment of a foreign country to:

(A) Build and develop allied and friendly security capabilities for self-defense and multinational operations;

(B) Provide the armed forces with access to the foreign country during peacetime or a contingency operation; or

(C) Build relationships that promote specific United States security interests.

(ii) The U.S. Government must obtain appropriate end-use and retransfer assurances from the foreign party and to ensure that the recipient is aware of and will comply with paragraph (f) of this section.

(5) Authorization under this section is for compliance with the ITAR only and does not constitute any other U.S. Government approval that may be required prior to the transfer of a defense article, and does not satisfy other obligations of U.S. law or regulation, or applicable Government process, procedure, or practice, including the requirement that any export of an item listed on the MTCR Annex receive the case-by-case review called for in the MTCR Guidelines.

(6) The exemption in this paragraph (a) does not apply when a U.S. Government department or agency acts as a transmittal agent on behalf of a private individual or firm, either as a convenience or in satisfaction of security requirements.

(7) The authorization requirement expressed in paragraph (f) of this section does not apply to defense articles and services exported from the United States pursuant to paragraphs (a)(1) and (3) of this section, provided the defense articles and services are subject to the terms thereof.

(b) *By a person on behalf of a department or agency.* A license is not required for the export, reexport, retransfer, or temporary import of a defense article or the performance of a defense service, when made by another person for a department or agency of the U.S. Government:

- (1) To a department or agency of the U.S. Government at its request; or
- (2) To an entity other than the U.S. Government at the written direction of a department or agency of the U.S. Government or pursuant to an international agreement or arrangement, for an activity authorized for that department or agency in paragraphs (a)(1) through (4) of this section.

(c) *Return to the United States.* No license is required under this subchapter for the return to the United States of a defense article exported pursuant to this section and not subsequently reexported or retransferred other than pursuant to this section, to:

- (1) A department or agency of the U.S. Government; or
- (2) The person who exported the item.

(d) *Prohibited activities and arms embargoes.* This section does not authorize any department or agency of the U.S. Government to make or authorize any export that is otherwise prohibited by any other administrative provisions or by any statute or that is inconsistent with U.S. arms embargoes or United Nations Security Council Resolutions (*see* § 126.1).

(e) *Export clearance.* For exports shipped other than by a U.S. diplomatic pouch or a U.S. Government aircraft, vehicle, or vessel, an Electronic Export Information (EEI) filing must be submitted to U.S. Customs and Border Protection using its electronic system(s) at the time of export, unless electronic submission of such information is unavailable, in which case U.S. Customs and Border Protection or the Department of Defense transmittal authority will issue instructions.

(f) *Change in end-use or end-user.* Any change in end-use or end-user of a defense article, to any party or use not authorized by this section, requires approval of the Directorate of Defense Trade Controls through a license or other approval.

Andrea Thompson,

Under Secretary for Arms Control and International Security,

U.S. Department of State.

Billing Code: 4710-25

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